IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
HIGH COURT LAND DIVISION
AT DAR ES SALAAM

LAND CASE NO. 12 OF 2023

K & A ENGINEERING CO LTD.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL .....1ST DEFENDANT

KIBAHA TOWN COUNCIL.....2ND DEFENDANTT

FELICHISM WILBAD MUSHI.....3RD DEFENDANT

GODFREY MKINI.....4TH DEFENDANT

REMINI ANDREW .....5TH DEFENDANT

PIUS WASULYWA.....6TH DEFENDANT

REHEMA MASAWE.....7TH DEFENDANT

MOHAMED ABDALLAH MAUNDA.....8TH DEFENDANT

MRASHANI CLETUS.....9TH DEFENDANT

JOHN MARTINE MKINI.....10TH DEFENDANT

GABRIEL NDEMASI.....11TH DEFENDANT

ELISANTE KIRITA.....12TH DEFENDANT

OMBENI MWASHA.....13TH DEFENDANT

AMARIN ALPHONCE.....14TH DEFENDANT

ASHAHADU MAHEKE MAHEKE.....15TH DEFENDANT

MAARIFA MPUTA.....16TH DEFENDANT

VICTOR KALINGA.....17TH DEFENDANT

NELSON JACOB SWAI.....18TH DEFENDANT

FANUEL MANDARI.....19TH DEFENDANT

DEUS KUSEKWA.....20TH DEFENDANT

REGISTERED TRUSTEE OF EFATHA CHURCH.....21ST DEFENDANT

RULING

05/02/2024 & 20/03/2024

GWAE, J.

It is well-established principle of law that, preliminary hearings must be disposed of before commencement of trial of cases on controversial issues between the parties to proceedings. (See the most illustrious case of **Mukisa Biscuits vs. West End Distributors** (1969) EA 696). This ruling emanates in the adherence of the said legal principle whereby the 9th, 12th and 18th defendant filed their notice of preliminary objection comprised of two points of law, to wit;

1. That, the amended plaint is defective for offending the provision of Order VII Rule 1 (e) of the Civil Procedure Code, Cap 33, Revised Edition, 2019 by failure to state when the cause of action arose and or that, the suit is hopelessly time barred
2. That, the suit is hopelessly time barred

The plaintiff one K & A Engineering Co. Ltd has sued the defendants jointly and severally for trespass of land measuring 5.484 hectors located at Plot No. 212-Tumbi- Kibaya Institutional area in Coast Region. The disputed

piece of land is identified by Certificate of Tile No. 479848 issued on the 20th day of January 1998 whose tenure is ninety (99) years (hereinafter the suit land).

Among his prayers are;- **One**, the plaintiff be declared the rightful owner of the suit property. **Two,** 18 defendants be declared trespassers to the suit land. **Three,** 18th defendants be ordered to pay general damages to the plaintiff for the whole duration they impended him from carrying out development to the suit area preferably Tshs. 20,000,000/= and **fourthly** Defendant to yield vacant possession of the disputed land with immediate effect.

The record of the Court reveals that, the 1st and 2nd defendant initially raised a preliminary objection, namely; the suit is bad in law for failure to establish cause of action against the 1st and 2nd defendants, contrary to VII Rule 1 (e) of the CPC and this Court gave its ruling on 20th July 2023 overruling the same. Similarly, the plaintiff when filed an amended plaint subsequent to the ruling, all defendants, except the 1st, 2nd and 3rd, defendants, filed a notice of preliminary objection (PO) based on the two points of law aforementioned

The hearing of the PO proceeded by way of written submissions. Mr. Rugatina, the learned advocate represented the plaintiff whereas Mr. Frank Chundu and Ms. Precious Ahmed, learned advocate, represented their defendants namely; 3rd , 4th 5th, 6th, 7th, 9th, 11th,12th. 14th, 15th, 16th 17th and 18th defendant.

Submitting on the 1st limb of objection herein, the defendants' counsel stated that, it is mandatory requirement coached under Order VII Rule 1 (e) of the CPC to indicate the date and/time the cause of action arose. They argued that from paragraph 1 to 9 of the plaintiff's amended plaint none of them disclose the date/period on which the cause of action arose. He urged the Court to **Camel in Camel Oil (T) Limited vs. Bahdela Co. Ltd**, Land Case No. 104 of 2021 where this court **(Mgeyekwa, J** as she then was now JA had these to say;

> *".....the time when the cause of action is not stated in the plaint which means the plaint is prepared contrary to the requirement of the law. Therefore failure to mention the cause of action is fatal, since the court cannot determine the time limit of the suit, whether the suit is within time or not."*

It was therefore the view of the learned counsel for the defendants aforementioned that, the plaint is fatally defective due to the complained defect subject of being struck out with costs.

The defendants' counsel also argued the 2nd point of law on limitation of time by stating that, the amended plaint as depicted under paragraph 6, the cause of action arose in the year 1997 and 1998 when she compensated the customary owners of the suit land granted to him. Thus, the plaintiff's suit is time barred in terms of item 22 of Part I to the Schedule of the Law of Limitation Act, Cap 89, R, E, 2019 (Hereinafter LLA). The defendants' advocates then prayed for an order dismissing this suit with costs under section 3 (1) of LLA.

In his response, the plaintiff's counsel argued the 1st point by stating that, the defendants' PO is improperly before the court constituting wastage of time and costs since both points revolve on the date when the cause of action arose. His line of argument is borrowed for the famous case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** (1969) EA 696 at page 701.

In the 2nd limb, the plaintiff's advocate submitted the specification of date is not necessary but period (when). Admittedly, the counsel for the

plaintiff argued that, following the nature of the defendants' continuous intrusion or trespass to the suit land renders the identification of time when cause of action arose difficulty. It was in his opinion that, there are certain facts, which need to be ascertained by the court during giving of evidence either orally or by affidavit.

In their rejoinder submission pertaining the 1st limb of objection, the defendants' counsel reiterated their submission in chief that, the requirement imposed under Order VII Rule 1 (e) of CPC is mandatory. In the 2nd objection, the learned counsel submitted that, since the plaintiff's complaint is based on the alleged acts or conducts of the defendants between 1997 and 1998, her suit is this hopelessly time barred. They added that the case of **Mukisa** (supra) cited by the plaintiff's counsel does salvage the suit as the points raised are purely points of law.

It is now time for the court to determine the points raised by the defendants' counsel and argued by the parties' counsel. *Starting with the 1st point,* whether the plaintiff has complied with the requirement under Order VII Rule 1 (e) of the CPC and if not whether the omission is incurable in the eye of the law.

Since the defendants' PO is based on the plaintiff's amended plaint, I meditate that, it is pertinent to seek to go back to the amended plaint, especially the essential paragraphs purporting to reveal cause of action against the defendants when it arose and reproduce them as herein under;

> *"16. This is the land dispute touching and concerning the plaintiff's landed property which was invaded by FELECHISM WILBARD MUSHI and 18th other intruders. Mani steps which the plaintiff pursued preceding the grant of Occupancy over the disputed land in January1998. The letter to that effect has (sic) its photocopy attached and marked as KA1, a map showing Plot No. 212 which is registered vide sic No. 315/327/ dated 19th November 1997 marked KA2-the measurement of the suit plot is 5.484 hectors. These preparatory steps cleared way towards the grant of certificate of Title in the plaintiff's company name bearing Title No. 47948 marked KA3 whose tenure is 99 years. Plaintiff applied for the sit plot from the Regional Land Officer since 1995 and in reply, the plaintiff-received letter issued by the Regional Land Development Officer of Coast Region bearing ref. MP/1/51001/Vol.11/9 dated 22nd April 1997 marked as KA4. There followed demand for payment of compensation to customary to customary owners of that land. Applicant approached the Village Executive Officer and Ward Executive Officer for identification of relevant customary owners likely to be affected. The importance of this step being taken at this stage was to precede valuation*

in pipe line. It was condition enshrined in the letter KA4 that no letter of offer would be issued if compensation had not been observed.

7. That in the company of the land officer and customary owners by names of JACOB SWAI, FELICHISIM MUSHI, AND MKINI. When valuation was conducted by one BYARUSHENGO the plaintiff was represented. The said BYARUSHENGO is a regional valuer whose valuation stood at Tshs. 720, 000/ =.....This compensation was remittances to be effected before Ward Executive Officer of Tumbi and applicant complied fully with those instructions. Plaintiff was give a receipt evidencing payment of compensation dated 18/08/1997 marked KA5. The money which the applicant paid as compensation before the WEO of Tumbi was later repaid as compensation before the WEO of Tumbi was repaid to FELICCHISIM MUSHI and GODFREY LUCA NKINI raised a complaint of inadequacy of amount paid which the plaintiff settled by awarding Tshs. 100,000/= outside the valuation report. This additional payment was effected on 23/12/1997 and relevant receipt issued is marked KA6.....

8. The applicant's case had five witnesses, namely; KUNDAEL, YAREDI MFWANGAYO (PW1) SWEETBERT FRANCIS (PW2.....I have thoroughly read the court record. Evidence of PW2 to PW5.....
It is the existence of this resistance which makes it pertinent the matter to be retried de novo (sic) in order to iron out

these controversies so as to enable the plaintiff embark upon development of the suit land free from unnecessary encumbrances

9. Viewed in the light of the background of the main dispute and appeal thereto which is chequered and above the existence of disgruntled elements amongst parties involved in the fresh suit, undoubtedly this court has jurisdiction....."

Equally, before embarking into the determination of the 1st point of objection, since the basis of the defendants' objection is on alleged non-compliance of Order VII Rule 1 (e) of CPC, it is perhaps apposite to have it reproduced herein below;

"1. The plaint shall contain the following particulars-

(a) The name of the court in which the suit is brought;

(b) To (d) Note relevant

(e) The facts constituting the cause of action and when it arose;

(f) To (h) not relevant

(i) A statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admit."

Having carefully looked at the above quoted paragraphs and statutory provisions, it sounds to me clearly that, the plaintiff attempted through the

above paragraphs to demonstrate his efforts to have the suit land granted to her and registered in the her name. She adhered to the processes between 1997 and 1998 following conditions precedent imposed in the acquisition of pieces of land customarily owned. She was equally obliged not only to plead facts constituting the cause of action but also when cause of action actually arose.

Apparently., the plaintiff has not expressly pleaded as when exactly she started claiming ownership and vacant possession and if so, against who save to the fact that he fully paid the compensation amount to the relevant authority as per valuation report in 1997 neither has she pleaded continuous trespass or when each defendant has exactly started trespassing the suit land.

Similarly, the plaintiff has not pleaded pendency of the case save to unclear expression that background of the main case and appeal thereto so as to enable exclusion of limitation of time at para. 9 of the amended plaint. The actual pendency of case was merely introduced in the course of written submission and not in the amended plaint. I am of the well-founded view that, submissions is neither part of the plaint or litigant's application nor evidence. These facts ought to have been plainly pleaded in the amended

plaint. I hereby subscribe to the decision of the Court of Appeal in **Salim Lakhani and Two Others vs. Ishfaque Shabir Yusufali (**As an administrator of the Estate of the Late Shabir Yusufali**),** Civil Application No 23 of 17 of 2019 (unreported) where it was stated;

> *"Having made the above observations, we wish to endorse Mr. Lugwisa's submission that security or an undertaking to furnish security cannot be made in the course of submissions, be they oral or written. For submissions are an elaboration of the content and issues canvassed in the notice of motion and the accompanying affidavit.*

Guided by the above-cited precedent, it cannot therefore be said that, the plaintiff pleaded exclusion of time nor can it be said that there has been a tremendous increase number of trespassers from time to time. In other words, pendency of main case before DLHT and appeal before this court **(Mlyambina, J)** is now reflected in the plaintiff's reply submission against the defendants' PO. This is contrary to the law.

Furthermore, no mentioning on the part of the plaintiff as to when the defendants had trespassed the suit land leave alone the said three recognised customary occupiers whom he also omitted to plead when they refused or

denied him vacant possession despite the asserted fact that, she paid full compensation. The plaintiff's amended plaint leaves a lot to be desired as to when cause of action arose though in some of defendants it would not be possible, but the time she became aware of denial or refusal for vacant possession is not pleaded. Or else if there are had been pending of cases in our courts that, also ought to have been clearly pleaded. In the light of the above shortfalls, I unhesitatingly hold the view that, the plaintiff's amended paint is incurably defective since the requirement is mandatory as was rightly decided by my learned sister in the case of **Camel's case** (supra). It must be noted that, while on one hand, it is true that, malpractice by advocates of raising unnecessary POs must be abhorred in avoidance of wastage precious time of our courts yet proper and adequate pleadings may assist the courts in disposing case expeditiously and without much costs. By pleading when the cause of action arose, some of defendants may not be unnecessarily joined or enable defendants to be in better position to adequately make their defence.

Since the plaintiff's cause of action does not indicate when it arose as rightly raised by the defendants and so observed by the court, it is follows, in my decided view, not easy for the court to certainly hold that, this suit is

time barred, if so, against who? In addition to that, if it were only against the said three previous occupiers/owners or even those who are said to have purchased the pieces of land within the suit land yet, it was necessary for the plaintiff to clearly plead date or period pertaining the time cause of auction arose. In the absence of disclosure of the date or period when cause of action arose, this court cannot thus be justified to hold that, the suit is time barred as correctly argued by the learned counsel for the plaintiff.

I have also observed the unusual and informal manner the suit is presented especially paragraph 8, though not ground for sustaining the defendants' PO or otherwise, mentioning of witnesses who appeared and testified in former judicial proceedings before DLHT and pleading the nature of their evidence is not common practice in our courts. Further, to that, the plaintiff has not pleaded as to why the 21st defendant is sued, thus no cause of action has been laid down and omission to state the value of the subject, which in view is fatal. The importance of indicating value of subject matter by the one presenting a plaint in the plaint was stressed by the Court **(Makaramba, J** now retired but not tired) in **Kerama Enterprises Co. LTD and 2 others vs. Exim Bank**, Commercial Case No. 12 of 2013 (unreported) where his Lordship stated that;

"I should point out here also that apart from the statement in the plaint of the value of the subject matter of the claim being crucial in the determining the jurisdiction of the court, it is also important for the filling fees."

That being the legal position, it thus follows that, even if the plaintiff would have pleaded when the cause of action arose, which has now disposed of the suit, yet the amended plaint would have some incurable defects aforementioned.

That said and done, I hereby sustain the 1st point of law raised by the defendants' and overrule the 2nd point of law. I accordingly strike out the suit with no order as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 20th March 2024

THE HIGH COURT OF TANZANIA ★ LAND DIVISION ★

M. R. GWAE

JUDGE